No. 86-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G.M. ATKINSON AND E.D. ATKINSON, INDIVIDUALS, D/B/A LAZY LE CATTLE CO. AND D/B/A/ ATKINSON CATTLE CO., AND VIVIAN ATKINSON, AN INDIVIDUAL,

Petitioners,

v.

ANADARKO BANK & TRUST CO., A STATE BANK,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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RESTATED STATEMENT OF THE CASE

The Petitioner's Statement of the Case mischaracterizes the proceedings and issues below.[1] This case presents an instance of a groundless preemptive attack by Petitioners

[1] For example, Petitioners insist on bringing to the Court's attention their allegation that Respondent breached an agreement to charge interest on the basis of a 365 day year rather than calculating interest on the basis of a 360 day year. (Petition, at pp. 3, 7-8). Petitioners then state that the jury returned a verdict in favor of Petitioners, leaving the inference that the jury found for Petitioners on both interest differential and 360 day issues. The facts are, of course, different. The jury returned a verdict in favor of Petitioners only on the interest differential claim, not on the 360 day issue. As the Fifth Circuit below observed:

unable to repay loans obtained from Respondent utilizing a de minimus interest rate question[2] as a pretext. The District Court, while finding the Petitioners liable to repay the loans to Respondent, permitted Petitioners' fraud and RICO claims to go to the jury. The jury returned a verdict of $2,899,796.33 in favor of the Petitioners, but the District Court, on a motion for judgment N.O.V., properly set aside the jury verdict on the RICO claims. The District Court's careful analysis of the RICO issues attempted to be raised by the Petitioner was examined by the United States Court of Appeals for the Fifth Circuit and unanimously affirmed in an opinion appearing at 808 F.2d 438 (5th Cir. 1987), reprinted in Petitioners' Supplemental Appendix.

"Plaintiffs assert in their brief that Anadarko breached an agreement to charge interest on the basis of a 365 day year by charging interest calculated on a 360 day issue. The jury, however, found against plaintiffs on this issue, and plaintiffs do not contest that finding on appeal." (Supp. Appendix at A-7).

[2]The interest differential found by the jury to be in violation of the contract between the parties was created by Respondent's use of First National Bank of Oklahoma City's "local" prime rate, as opposed to that bank's "national prime rate." (See Supp. Appendix at A-4). The District Court found the amount to be $18,100.83 and credited Petitioners with that amount as an offset against Petitioners' $1,082,647.06 note-based liability to Respondent, leaving Respondent with a net judgment against Petitioners of $1,064,546.23. (Supp. Appendix at A-8). As the Fifth Circuit correctly noted, Respondent's error was clearly de minimis (Supp. App. at A-8), especially when the total amount loaned is considered: $3,458,880.53 principal was loaned. (Supp. App. at A-4).

ARGUMENT

The Petition Should Be Denied; This Case Presents No Reason For The Exercise of Certiorari Jurisdiction

The Petition should be denied; this case presents no reason for the exercise of certiorari jurisdiction. Petitioners' irrelevant excursus into the history of RICO construction at least demonstrates that the Fifth Circuit does not bear the statute ill will. (Petition, p.5). The Fifth Circuit's decision below broke no new legal ground. Indeed, the Fifth Circuit's decision is an extensively fact-based opinion, simply determining that Petitioners had failed, evidentially, to demonstrate the existence of the requisite enterprise.

Petitioners' use of the "liberal construction" principle as a talismanic device obscures the real issue: any statute has limits, even RICO. As the Seventh Circuit noted, in a case affirmed by this Court on other grounds:

> "We do not think the general principle of liberal interpretation of RICO can be used to stretch section 1962(c) to reach this situation in the face of the subsection's own limits." *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384, 400 (7th Cir. 1984), aff'd _____ U.S. _____, 105 S. Ct. 3291 (1985).

Petitioners' make four assertions in attempting to justify the exercise of the Court's jurisdiction. None of the four assertions are well taken. When examined, the Petitioners assertions demonstrate only that certiorari is *not* appropriate.

Assertion one: The Fifth Circuit engaged in disparate interpretation of RICO to protect a member of the "establishment." (Petition, pp. 5-6). Nonsense. Any fair reading of the Fifth Circuit's opinion, and the District Court's as well (App., starting at A-35), reveals only that both courts below

applied established law, including this Court's opinion in *United States v. Turkette*, 452 U.S. 576 (1981) to determine whether sufficient evidence was offered at trial by Petitioners to support a jury verdict on RICO. There is no indication in either opinion of hostility toward RICO, nor of a desire to limit RICO to "non-establishment" defendants.

Assertion Two: The issues are not isolated and further development by future decisions in other circuits is unlikely. (Petition, at p.6). Not so. As Petitioners admit, the Eleventh Circuit's decision in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied* 459 U.S. 1183 (1983) is a minority of one. Equally significant are three additional facts: (1) *Hartley* was an early case, the first appellate case on the issue Petitioners now present to this Court, as the Eleventh Circuit noted, (*Id.* 678 F.2d at 988: "None of these cases, nor any others uncovered in our search, have squarely dealt with the issue now before us."); (2) No other appellate decision has followed *Hartley*;[3] and (3) The Eleventh Circuit has not had an opportunity to reassess *Hartley* in the wake of its widespread disapproval.[4]

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[3]The Courts of Appeal for four other circuits have, subsequent to *Hartley*, considered the issue. All four have declined to follow *Hartley*. *See e.g.*,specifically declining to follow *Hartley*, *Bennett v. United States Trust Company*, 770 F.2d 308, 315 (2d Cir. 1985); *Hirsch v. Enright Refining Co., Inc.* 751 F.2d 628, 633-34 (3d Cir. 1984); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122-123 (5th Cir. 1986); *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384, 399-402 (7th Cir. 1984), *aff'd on other grounds*, ____ U.S. ____, 105 S. Ct 3291 (1985).

[4]*Hartley* was premised on the same faulty assumption made by Petitioners, and discussed *infra*: to read "person" as separate from "enterprise" would permit a corrupt corporation to escape punishment. In any event a conflict between circuits no longer automatically creates a cert-worthy case. See Stern & Gressman, *Supreme Court Practice* (5th ed. 1978) at § 4.4.

Assertion Three: The Fifth Circuit's decision permits banks and other establishment figures to "engage in proscribed conduct" and states that "criminal activity is approved behavior so long as it is conducted by bank employees ... " (Petition, at p. 6). Again, nonsense. Petitioners argue that to require differentiation between person and enterprise under § 1962(c) would be to permit a corrupt corporation to evade punishment. The U.S. Court of Appeals for the Seventh Circuit expressly has rejected this argument and explained its fallacy.

There are, within RICO, tensions between competing policies. As the Seventh Circuit analyzed the structure of § 1962, the "tensions between these policies[5] may be resolved sensibly and in accord with the language of section 1962 by reading subsection (c) together with subsection (a)." *Haroco, supra* 747 F.2d at 401. Thus, a corporation-enterprise may be liable, in an appropriate case, as a perpetrator under § 1962(a). *Id.*, 747 F.2d at 402. The "horrible" presented by Petitioners simply does not exist. The "RICO provisions have already taken into account these competing policies in different situations and a careful parsing of section 1962 reveals a sensible balance between these policies." *Id.*, 747 F.2d at 401. In this case, Petitioners elected to sue under § 1962(c), which proved at trial to be a plainly inapplicable part of 1962, not a concern of this Court[6]

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[5]The policies mentioned by the *Haroco* Court include (a) obtaining relief against the central perpetrator, (b) creating deep pocket liability, and (c) shielding corporations where it appears that the corporation is a passive instrument or even a victim of the racketeering activity. *Id.*, 747 F.2d at 401.

[6]No violation of § 1962(a), (b), or (d) was alleged; none occurred. And, as adjudicated below, the Petitioners' § 1962(c) claim failed as a matter of evidence. (Supp. App. at pp. A-6 & A-7; App. at A-36 & A-37).

Assertion Four: The Fifth Circuit opinion conflicts with decisions other than *Hartley*. Again, not so. Sprinkled throughout Petitioners' brief document are unexplained assertions that various other circuit[7] and Supreme Court[8]

[7]We note that four of the alleged "conflicting" decisions are Fifth Circuit decisions. Two comments are appropriate. First, normally, absent compelling reasons, this Court's past practice has been to not consider a conflict among a circuit's decisions as a basis for granting a writ of certiorari, Stern & Gressman, *Supreme Court Practice* (5th ed. 1978), at § 4.6. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). The conflict is viewed as "an intramural matter." Harlan, *Manning the Dykes*, 13 Record of N.Y.C.B.A. 541, 552 (1958). Second, and equally important, the decisions in fact do not conflict. *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976), simply ruled that an illegitimate business can constitute an enterprise. *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982) held that an allegation that a "group of individuals associated in fact with various corporations" could constitute an enterprise, since § 1961(4)'s definition of enterprise is inclusive, not exclusive. Neither case involved the issue of what evidence is necessary to create an association in fact of a corporation and its employees. In *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), *cert. denied* 437 U.S. 953 (1978) the court based its finding of a "enterprise" on proof very similar to that required by this Court's decision in *Turkette*. The court required and found evidence sufficient to prove the existence of an "association" which furnished a "vehicle for the commission of two or more predicate crimes." The court also required and found evidence sufficient to prove a "thread" tying all of the participants in the enterprise together, being the "desire to make money" and the "purpose" "to profit from crime". *Id.*, 571 F.2d at 898-99, 904. In the present case, however, as the Fifth Circuit observed, in applying *Turkette*, the record was completely devoid of relevant evidence. *United States v. Welch*, 656 F.2d 1039 (5th Cir. 1985), upheld, on evidentiary grounds, convictions of three individuals. The one non-Fifth Circuit case cited, *United States v. Benny*, 786 F.2d 1410 (9th Cir. 1985), involved a ruling that a sole proprietorship employing several people constituted an enterprise separate and independent from the owner, who in the case was the culpable person. The court noted a corporation could not be the enterprise and a person. *(Id.*, 786 F.2d at 1416).

[8]*United States v. Turkette*, 452 U.S. 576 (1981). In *Turkette*, this Court determined that the term "enterprise" as used in RICO encompassed both legitimate and illegitimate enterprises. Nothing in

decisions conflict with the decision below. None of these cases are in fact contradictory to the opinion below; indeed, to the extent relevant, all the other opinions support the Fifth Circuit's decision.

CONCLUSION

For the principal reason that Petitioners have totally failed to demonstrate any justification for this Court's exercise of its certiorari jurisdiction, Petitioners' request must be denied. The Petition for a Writ of Certiorari is without merit. Additionally and importantly, the Fifth Circuit, in a unanimous, non-controversial and well-reasoned opinion, correctly affirmed the District Court's action.

Respectfully submitted,

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the Fifth Circuit opinion below challenges that determination. This Court's criteria for determining an association-in-fact, ongoing organization and functioning as a continuing unit, 452 U.S. at 583, was scrupulously followed by both the District Court and the Court of Appeals in this case. The Fifth Circuit accurately evaluated Petitioners' evidentiary record in light of *Turkette's* standards and found it wanting, unanimously affirming the identical conclusion reached by the District Court.

CERTIFICATE OF SERVICE

This is to certify that I have this day served three (3) copies of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI on the attorney of record by depositing such copies in the United States Mail, postage prepaid, addressed as follows:

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This the 2nd day of June, 1987

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